IN THE COURT OF APPEALS OF IOWA

No. 1-1002 / 11-0874
Filed January 19, 2012

Upon the Petition of
JASON ALLEN MANN,
Petitioner-Appellant,

And Concerning
KAYE LYN HANNER,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Jeffrey A. Neary, Judge.

Jason Mann appeals from the decree of child custody and support. **AFFIRMED.**

Harold K. Widdison of Harold K. Widdison, P.C., Sioux City, for appellant.

David L. Reinschmidt of Munger, Reinschmidt & Denne, LLP, Sioux City, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings.

Jason Mann and Kaye Hanner are the parents of a son born in December 2001. They have never been married. Kaye has been the child's primary caregiver and physical custodian. The parties entered into a private, confidential custody and support agreement in 2004, pursuant to which the child remained in Kaye's physical custody and Jason was to pay $650 per month in child support and pay for medical insurance.

In February 2010, Jason filed a petition to establish custody, support, and visitation (DRCV141714); Kaye filed a petition for modification of child support and motion for ex parte order (DRCV141690). The matters were consolidated and tried on March 23 and 24, 2011.

On May 19, 2011, the district court entered its decree establishing paternity, awarding the parties joint legal custody of the child, awarding Kaye physical care, setting a minimum visitation schedule, and ordering Jason to pay child support in the amount of $1071.15 per month. In addition, the court ordered Jason to pay $7500 toward Kaye's attorney fees.

Jason now appeals,[1] contending the court erred in awarding Kaye physical care of the child. He also argues the court awarded Kaye excessive attorney fees.

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[1] We note several problems with the appendix filed in this appeal, which made this court's review much more difficult: (1) There was no list of relevant docket entries in the district court proceedings. *See* Iowa R. App. P. 60905(2)(*b*)(2); (2) The names of witnesses were not inserted at the top of each transcript page included in the appendix. *See* Iowa R. App. P. 6.905(7)(*c*); (3) Omitted pages of transcript were not indicated by asterisks. *See* Iowa R. App. P. 6.905(7)(*e*); and (4) The appendix includes poorly

II. Standard of Review.

This action for custody and visitation was filed in equity and, therefore, our review is de novo. *See Markey v. Carney*, 705 N.W.2d 13, 19 (Iowa 2005). We review equitable actions de novo. Iowa R. App. P. 6.907. When we consider the credibility of witnesses in equitable actions, we give weight to the findings of the district court, but are not bound by them. Iowa R. App. P. 6.904(3)(*g*).

III. Physical Care.

In child custody cases where the parents have never married, our legal analysis is the same as child custody cases in dissolution of marriage proceedings. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988). In determining physical care for a child, our first and governing consideration is the best interests of the child. Iowa R. App. P. 6.904(3)(*o*). We consider the factors listed in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). Our objective is to place the child in the environment most likely to bring the child to healthy physical, mental, and social maturity. *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995).

Jason admits Kaye has continuously been the child's primary caregiver, but asserts that she has demonstrated a lack of stability by moving five times since the child's birth; her paramour served time for armed robbery; she was terminated from her previous employment; and, in 2008, Kaye was convicted of operating while intoxicated. We consider carefully these events,[2] but find they do

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reproduced photographs and other exhibits. *See* Iowa R. App. P. 605(3)(*c*) (noting all copies of exhibits "must be legible").

[2] It is true that in 1997 Kaye's paramour pleaded guilty to robbery for his part in a robbery committed when he was nineteen years old. His sentence has been served. He

not outweigh Kaye's history of attentive and effective parenting. Kaye has been the primary caregiver since the child's birth and the child appears to be doing well in her care. As the trial court found, Jason exhibited much less interest in his son until he and his current wife developed their relationship, "at which time his interest in his son changed noticeably and fortunately." Jason and his wife provide care for the child before and after school on days Kaye works. The child has had the benefit of continuing contact with his half-siblings in both his mother's and father's households.

"Generally, we give considerable deference to the district court's credibility determinations because the court has a firsthand opportunity to hear the evidence and view the witnesses." *In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007). The district court had the opportunity to view the parties and, upon our de novo review, we agree with the following findings:

> [The child] appears to be well adjusted to the custody and visitation schedule the parties have been utilizing since the [2004] confidential agreement. Both parties have been playing an active role with [the child] and parenting well with each other. The parties' interactions with one another is worthy of compliment. They seem

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was released in 2005 and began living with Kaye several months later, upon his release from a work-release facility. He obtained employment after incarceration and worked for the same company until 2010 when he contracted pneumonia and was terminated due to his illness. (As an aside, we note that Jason too was charged with criminal offense at the age of nineteen. He explained the possession of cocaine charge as a consequence of being a "young punk.")

As for Kaye's loss of employment in 2010 for repeated tardiness, she asserts this was in part due to issues arising when she dropped the child off at Jason's in the morning. Kaye obtained new employment thereafter.

A court-ordered substance abuse evaluation following the 2008 OWI found no ongoing alcohol issues. Because children were in the car at the time of the OWI charge, Kaye was investigated by the Department of Human Services and subjected to unannounced visits by social workers for six months. No concerns about child safety were found.

We do not minimize these issues, but note the child has been adequately cared for and no current concerns are apparent in this record.

> to treat each other with respect and acknowledge each other's relationship with their son and support one another as well in that relationship. They are commended for their efforts.

We conclude, as did the trial court, it is in the child's best interests to continue to be in Kaye's physical care, with liberal visitation awarded to Jason. We encourage the parties to continue to provide their son with maximum contact with both parents, half-siblings, and extended family. We affirm the district court's decision placing the child in Kaye's physical care.[3]

IV. Attorney's Fees.

A. Trial fees. Jason argues the trial court awarded Kaye excessive attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Giles*, 338 N.W.2d 544, 546 (Iowa Ct. App. 1983). "Whether attorney fees should be awarded depends on the respective abilities of the parties to pay." *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). We will not disturb an award of attorney fees absent an abuse of discretion. *See In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006).

Here, Jason has an average annual income of over $159,000, which he receives as a member of the Soboba Band of Luiseno Indians. Kaye is a dental assistant and earns $24,960. Kaye sought an award of $10,000 in attorney fees. The district court concluded, "Kaye should pay some of her own fees, but the majority should be paid by Jason given the parties' incomes and the outcome of the case." We cannot say the district court abused its discretion. We affirm on this issue.

[3] Because we affirm the award of physical care to Kaye, we need not address Jason's contingent child support challenge.

B. Appellate fees. Kaye also seeks an award of attorney fees on appeal. We consider the needs of the party making the request, the ability of the other party to pay, and the relative merits of the appeal. *Id.* We award Kaye $2500 in appellate attorney fees.

Costs of this appeal are assessed to Jason.

AFFIRMED.